In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1175

ARNOLD BERKOWITZ, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioners are a corporate preparer of income tax returns and its president. An undercover internal revenue agent, posing as a customer, requested petitioners to prepare his tax return (R. 33-34).[1] The return which petitioners prepared was inaccurate and incomplete (R. 50). The Internal Revenue Service then determined to conduct an investigation of the tax liabilities of petitioners' customers (R. 32-33). To facilitate this investigation, the Service caused to be issued an internal revenue summons to petitioners, requesting production of the names, addresses, and Social Security numbers of the customers for whom they had prepared 1971 federal income tax returns. Petitioners refused to comply with the summons, and the

[1] "R." refers to the record appendix filed in the court of appeals.

government brought this suit for enforcement in the United States District Court for the Eastern District of Pennsylvania. The district court ordered enforcement (Pet. App. B) and the court of appeals affirmed (Pet. App. A).

Petitioners appear to make three separate contentions—that the investigation of some but not all commercial tax preparers works a denial of equal protection (Pet. 15-16, 23-24), that the summons here was not issued in good faith (Pet. 16-17, 21-23), and that the summons was unauthorized by the statute, Section 7602 of the Internal Revenue Code of 1954, 26 U.S.C. 7602, in that it failed to name the customers whose returns were under investigation (Pet. 17-21).

Petitioners' first two arguments are insubstantial. There is no denial of equal protection involved when the government, in the conduct of a nationwide investigation of an industry, selectively chooses which companies to investigate first. See, *e.g., Federal Trade Commission* v. *Universal-Rundle Corp.*, 387 U.S. 244. Similarly, there was ample evidence to support the finding below (Pet. App. B, p. 12A) that the summons was issued in good faith principally for the purpose of conducting civil audits of the returns of petitioners' customers (R. 36) and satisfied the requirements of *Donaldson* v. *United States*, 400 U.S. 517.

We believe petitioners' remaining contention—that an internal revenue summons may be issued only in connection with an investigation of a named taxpayer—also is insubstantial, for the reasons stated in our petition for a writ of certiorari in *United States* v. *Bisceglia*, No. 73-1245, certiorari granted, April 15, 1974.[2] However,

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[2]A copy of our petition in *Bisceglia* is being furnished to petitioner's counsel.

since this issue is presently before the Court in that case, we suggest that the petition for a writ of certiorari be held pending this Court's disposition of *Bisceglia*.[3]

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

APRIL 1974.

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[3]The court of appeals below, while disagreeing with the Sixth Circuit's analysis in *Bisceglia*, attempted to distinguish the two cases on the ground that whereas the information sought in *Bisceglia* was "not otherwise in the control of the Internal Revenue * * * the request here * * * is to secure enough facts so that the Commissioner may locate data [*i.e.*, the returns filed by petitioners' customers] which he now possesses" (Pet. App. A, p. 4A). This distinction is unpersuasive, however, for internal revenue summonses are commonly used to obtain information which is not otherwise available to the Service.